Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

Linda Jones,
Petitioner,

v.

Bayer Corporation,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For The Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Clifford H. Hardwick
Attorney for Petitioner
Roswell Professional Park
Suite E-1
11205 Alpharetta Highway
Roswell, Georgia 30076-1442
(770) 772-4700

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 99-13406

D.C. DOCKET NO. 97-02575-CV-CC-1

LINDA JONES,

Plaintiff-Appellant

versus

BAYER CORPORATION,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Georgia

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(July 27, 2000)

Before ANDERSON, Chief Judge, DUBINA and HILL, Circuit Judges.

PER CURIAM:

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed generally for the reasons set forth in the opinions of the magistrate judge and district judge.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LINDA JONES,	:	
Plaintiff,	:	
	:	**CIVIL ACTION FILE**
v.	:	**NO. 1:97-CV-2575-CC**
	:	
BAYER CORPORATION:		
Defendant.	:	

JUDGMENT

This action having come before the court, Honorable Clarence Cooper, United States District Judge, for consideration of defendant's Motion for Summary Judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 17th day of August, 1999.

LUTHER D. THOMAS
CLERK OF COURT

By: s/Traci Clements-Campbell
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
August 17, 1999
Luther D. Thomas
Clerk of Court

By: s/Traci Clements-Campbell
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LINDA JONES,	:	
Plaintiff,	:	
	:	**CIVIL ACTION FILE**
v.	:	**NO. 1:97-CV-2575-CC**
	:	
BAYER CORPORATION:		
Defendant.	:	

ORDER

Plaintiff brought this action alleging discrimination based upon her sex and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Pending before the Court in this discrimination action is defendant's Motion for Summary Judgment [23-1]. Magistrate Judge Strother has issued a report that GRANTS defendant's motion. Plaintiff has filed objections to the Magistrate's report. After thoroughly reviewing plaintiff's response brief the Court finds that, save a cite for the summary judgment standard - plaintiff' response brief at ¶ 4, plaintiff does not cite a single case and does not refer the Court to any specific affidavit or deposition testimony to substantiate her arguments. Consequently, plaintiff puts the Court in the position of having only plaintiff's counsel's arguments to consider in opposition

to defendant's motion for summary judgment. It is well settled that this is not acceptable. Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The arguments of counsel, standing alone, are insufficient to defeat a properly supported motion for summary judgment. Therefore after thoroughly reviewing the record in this case and plaintiff's objections to the Magistrate's recommendation, this Court finds that the Magistrate's report is correct both in fact and in law, and hereby ADOPTS the Magistrate's report and recommendation as the judgment of this Court. Accordingly, defendant's Motion for Summary Judgment [23-1] is GRANTED.

It is SO ORDERED, this 17th day of August, 1999.

s/Clarence Cooper
CLARENCE COOPER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LINDA JONES,	:	
	:	
Plaintiff,	:	**CIVIL ACTION FILE**
	:	**NO. 1:97-CV-2575-CC**
v.	:	
	:	**ORDER FOR SERVICE**
BAYER CORPORATION:		**OF REPORT AND**
	:	**RECOMMENDATION OF**
Defendant.	:	**UNITED STATES**
	:	**MAGISTRATE JUDGE**

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636(b)(1) and this Court's Local Rule 72 and Internal Operating Procedure 920. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of the receipt of this order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district

court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 19893), cert. denied, 464 U.S. 1050, 104 S.Ct. 729 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 30 day of July, 1999.

s/John R. Strother, Jr.
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LINDA JONES,	:	
Plaintiff,	:	
	:	**CIVIL ACTION FILE**
v.	:	**NO. 1:97-CV-2575-CC**
	:	
BAYER CORPORATION:		
Defendant.	:	

REPORT AND RECOMMENDATION

Introduction

The plaintiff filed this action alleging discrimination based on her sex and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq, as amended by the Civil Rights Act of 1991, 42 U.S.C. §1981a. The action is currently before the undersigned on the defendant's Motion for Summary Judgment (23) and Motion to Strike (44).

MOTION TO STRIKE

The defendant moves to strike the plaintiff's response to the Motion for Summary Judgment. The defendant's Motion to Strike is hereby DENIED. (44).

SUMMARY JUDGMENT

Fed. R. Civ. P. 56(c) provides that summary judgment shall be rendered if "there is no genuine issue as to a material fact and [if] the

moving party is entitled to judgment as a matter of law." See, Young v. General Foods Corp., 840 F.2d 825 (11th Cir. 1988), cert. denied, 488 U.S. 1004 (1989).

> **[T] plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other factors immaterial.**

Id. quoting, Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Where the evidence is merely colorable or is not significantly probative, summary judgment is appropriate. Id., citing, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In determining whether the moving party has demonstrated that a genuine issue exists in the case, the court reviews the evidence and all facts in the case in the light

most favorable to the party opposing the motion. Thrasher v. State Farm Fire & Casualty Co., 734 F.2d 637 (11th Cir. 1984). If the party seeking summary judgment meets the initial burden of demonstrating that there is no genuine issue of material fact, the burden then shifts to the non-moving party to come forward with sufficient evidence to rebut this showing with affidavits or other relevant and admissible evidence. Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991), cert. denied, 502 U.S. 1048, (1992). A non-moving party opposing a summary judgment motion which is supported by affidavits cannot meet the burden of coming forth with relevant competent evidence by simply relying on legal conclusions or evidence which would be inadmissable at trial. Id. Furthermore, the evidence cannot consist of conclusory allegations or legal conclusions. Id.

FACTS[1]

Mississippi

Plaintiff, Linda Jones (hereinafter "Jones"), was hired by Bayer Corporation, (hereinafter "Bayer") on May 31, 1991, as a Pharmaceutical Sales Representative ("PSR"). She was hired by the Jackson, Mississippi Division Sales Manager ("DSM"), George

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[1] Facts based on material facts set forth by defendant [23] and admitted by plaintiff [45] and unrefuted portions of affidavits of Guthrie, Turner, Stamboulieh and the excerpts provided from depositions of Jones, Stamboulieh, Collins and Conder-Flanery.

Stamboulieh (hereinafter "Stamboulieh") after several interviews with both Stamboulieh and the Regional Sales Manager ("RSM") Bill Corley (hereinafter "Corley"). Corley approved the hiring of Jones.

The PSR Standards of Performance are distributed to all sales representatives and set forth the five basic competencies on which Bayer sales representatives are evaluated on interim and annual bases. Those five competencies include: sales to quota, contribution to division, territory management (including retail/wholesale, physician and hospital management), administration, and selling skills.

Prior to 1996, sales representatives were evaluated on a code range from 1 to 5. Code 1 is "Unsatisfactory," Code 2 is "Marginal," Code 3 is "Proficient" or "Good," Code 4 is "Very Good", and Code 5 is "Excellent." As a PSR, Linda Jones was not eligible for promotion (i.e., she did not meet the minimum criteria of 24 months in grade as a PSR) until Spring 1993. On or about January 27, 1993, Stabmoulieh proposed Jones for promotion from PSR to PSR I. This promotion was approved by Corley and Human Resources to be effective April 1, 1993. This was consistent with the framework for promotions of sales representatives.

The minimum, general criteria for consideration for a promotion from PSR I to PSR II at Bayer were 36 months in grade as a PSR I and two consecutive annual Code 4 evaluations. On May 19, 1993, Jones received her Interim

performance valuation for 1993 which gave her a "good" rating, the equivalent of a Code 3. On or about October 4, 1993, Jones received her Annual performance evaluation for 1993 which gave her a score placing her in the "very good" range which is the equivalent of a Code 4.

On or about February 4, 1994, Stamboulieh forwarded a memorandum summarizing his field visit evaluation of Jones. In that memorandum, Stamboulieh raised Jones' "contribution to division" and "positive interactions with your peers and HSSs" as areas which needed improvement. Stamboulieh stated that he was concerned that Jones was not working to be a part of the sale team and that her rapport with her peers was at an "all time low." (Stamboulieh Dep., pp. 82-84). Plaintiff denies that she had problems with peers or that her rapport was at a low.

Jones won President's Club for the calendar year of 1993. President's Club is an award based on a representative's sales performance. Jones expressed a desire to take her young daughter, Stephanie, as her "significant other" to Hawaii for the President's Club. This was at first denied because of the child's age but after Jones raised the issue with management, the denial was reversed, and Jones was permitted to take her daughter on the trip. Jones denies there had ever been an age requirement for a significant other.

On or about July 18, 1994, Jones received her Interim performance evaluation for 1994 which gave her a score placing her in the "good"

range which is the equivalent of a Code 3. This evaluation was prepared by Stamboulieh and approved by Corley. Jones requested a meeting with Corley, Laura Collins of Human Resources, and Stamboulieh to discuss her concerns with the July 18, 1994, Interim performance evaluation. Plaintiff also wanted to discuss her problems with Stamboulieh because she felt women were unfairly treated by Bayer.

Plaintiff felt that men and women sales representatives were not treated the same. She contended that women were required to come into Jackson for the night before sales meetings to have dinner with Stamboulieh and were referred to as his "harem." She also contended the women were subject to off color remarks, and jokes, asked to go to topless bars and encouraged to drink and loosen up. She was encouraged by her manager to have breakfast meetings with a male co-salesperson. Management contends this socialization was to make plaintiff more of a member of the sales team. Plaintiff was quite upset that her interim rating went down from a 4 to a 3 in July of 1994.

During the time that Jones was employed as a sales representative in Stamboulieh's division, she was the highest salaried representative (male or female) in that division. In the Jackson Division for the 1990-1995 time period, Jones received higher annual performance evaluations than any male representatives in that division except that for year-end 1994 she received the same Code 4

evaluation as two male sales representatives. As a result, Jones also received higher merit increases than did males in her division. During the 1990 to 1995 time period in which Stamboulieh was the DSM for the Jackson Division, the number of female representatives increased from one out of eight (12.5 percent) to four out of eight (50 percent). During the 1990 to 1995 time period, Stamboulieh promoted four females and one male from the PSR to PSR I level.

Neither Stamboulieh nor Corley ever propositioned, touched, or used inappropriate sexual language in Jones' presence. During the time that Stamboulieh was the DSM for the Jackson Division, Linda Jones never indicated an interest in a promotion to become a Hospital Sales Representative or a Biological Account Executive. During the time that Corley was the RSM for the Memphis region, Jones never advised Corley, or anyone else, of an interest in a promotion to a Hospital Sales representative or Biological Account Executive position. (Corley Aff. ¶ 18).

In early 1995, there was a reorganization in which Corley and Stamboulieh were transferred. After February of 1995, Corley and Stamboulieh had no further contact or interaction with Jones of any kind. After January-February of 1995, Corley and Stamboulieh did not supervise Jones, review or evaluate her performance, or participate in any employment decisions with respect to Jones.

After this January 1995 reorganization,

Jones was transferred into the division of El Rosato (hereinafter "Rosato"). Jones never had any problems with her new manager, Rosato, during her employment with Bayer.

In late 1995, the Bayer Pharmaceutical Division changed its performance evaluation system from a Code 1 through 5 rating scale to a three-tiered rating scale consisting of "below expectations," "meets expectations" and "exceeds expectations." For the calendar year 1995, Rosato evaluated Jones at a "meets expectations" level. In February of 1996 Jones advised Rosato of her interest in advancement opportunities with Bayer, including in the Biological Division.

On February 22, 1996, Jones gave a discovery deposition in a case styled *Kimberly Ridgeway v. Miles, Inc., et al.*, Case No. 93-3305-III (hereinafter "*Ridgeway*") in the Chancery Court of Davidson County, Tennessee. In that deposition, Jones testified she was not then (February 1996) interested in promotion into management because of concerns with the travel required, but that she would be interested in the future. At the time of Jones' deposition in *Ridgeway* in February of 1996, Jones no longer had Corley or Stamboulieh in her line of management. She had previously told Stabmoulieh that she was not interested in promotion into management.

In January or February of 1996 the plaintiff talked to her manager, Rosato, about interviewing for a biological representative position. She at first considered a position in

New Orleans, but decided not to interview for it when she learned of the amount of overnight travel that would be required. She then learned of positions in Dallas and Houston. [Jones Dep. pp. 90-92].

On or about May 7, 1996, Jones traveled to Texas to interview for the Houston Biological position. Jones had previously declined to interview for the biological position in Dallas, which was also available. Jones was interviewed by Carol Guthrie and Craig Turner. Two other individuals were interviewed as candidates for the Houston biological position, Mark Ramby and Rick Morgan. Ramby was selected for the position. Both Guthrie and Turner prepared memoranda summarizing the interview of Jones.

Turner and Guthrie conducted competency based interviews designed to evaluate potential candidates in a number of different areas. The core competencies which they were looking for were as follows: adaptive thinking; versatility; self confidence; resourcefulness; action and results orientation; customer service orientation; organization awareness; concern for impact; interpersonal awareness; relationship building; and teamwork.

Based on the interview of plaintiff, Turner and Guthrie determined that she was not the best qualified candidate for the position. Guthrie and Turner felt that in each of the core competencies, Ramby exhibited stronger skills than did the other two applicants. At the time of Jones' interview for the Houston Biological

Account Executive position, neither Guthrie nor Turner had any knowledge that Jones had given a deposition in the *Ridgeway* case or of Jones' substantive testimony in that deposition. (Guthrie Aff. ¶ 16, Turner Aff. ¶ 15). Mark Ramby was promoted from PSR I to Biological Account Executive on May 20, 1996.

At the time of Ramby's promotion to Biological Account Executive, there were 26 females and 24 males as Bayer account executives. Four female and five male Biological Account Executives were located in the south central business area. (Guthrie Aff., ¶ 18).

Ms. Conder-Flanery, the South Central Business Area Director, set up a career development meeting with the plaintiff and Laura Collins of Human Resources. This meeting occurred on June 28, 1996. Conder-Flanery was unaware of Jones' testimony in the *Ridgeway* meeting but was aware of Jones' interest in being promoted. She was also aware that the interview with Guthrie and Turner had not gone well. Conder-Flanery attempted to discuss Jones' development as a Bayer employee and her career opportunities. Conder-Flanery summarized the career development meeting in a memorandum. Prior to this career development meeting, while Laura Collins understood Jones had been deposed in the *Ridgeway* case, she had no knowledge of any of Jones' substantive testimony and had not discussed her testimony with anyone. When Jones told her she had been subpoenaed to testify, she had told Jones to "tell the truth."

(Collins Aff., ¶ 33; Collins Aff., Exhibit "D"). Jones considered the meeting to be insulting to her. During the career development meeting, Jones quit on three separate occasions and advised Conder-Flanery and Collins that she had another job elsewhere. (Conder-Flanery Dep., p. 31; Collins Dep., pp. 90-95; *see also* Jones Dep., pp. 108-109).

On or about June 28, 1996, Jones advised Bayer that she was interested in withdrawing her resignation. (Jones Dep., p. 109; Collins Dep., p. 102). On July 28, 1996, by memorandum from Laura collins, Jones was advised that her resignation was effective and that she would be closed out. (Collins Dep., p. 104).

On August 12, 1996, Jones filed a Charge of Discrimination with the Mississippi EEOC. On September 30, 1996, Bayer filed its formal response to the EEOC charge of discrimination. The EEOC made no determination with regard to Jones' claims of discrimination and issued a right to sue letter on July 25, 1997.

All of Jones' complaints with regard to Stamboulieh and Corley occurred prior to the Bayer sales force reorganization of January, 1995, a minimum of 18 months before the filing of Jones' Mississippi EEOC charge.

<u>Georgia</u>

On August 25, 1996, Bayer DSM, Harold Morgan, ran an advertisement for one PSR position in the Columbus, Georgia territory. Morgan was principally responsible for making

the hiring decision for the Columbus position subject to his Regional Manager's approval. Morgan did not consider any applicants who forwarded resumes to him after September 2, 1996. (Morgan Aff., ¶¶ 4, 5). Morgan received Linda Jones' handwritten cover letter and resume via certified mail, return receipt requested on September 17, 1996. Linda Jones was not considered as a candidate for the Columbus position because her response to the advertisement was received 23 days after the advertisement ran and 15 days after Morgan had completed review of responses to the advertisement. (Morgan Aff. ¶¶ 6 & 7). Even had her response been timely, Morgan states that he would have ruled her out as a viable candidate because he considers hand-written cover letters to be unprofessional and to indicate a lack of commitment to the application process and attention to presentation. Additionally, Jones' return address of Alpharetta, Georgia would have required a relocation at Bayer's expense. Finally, the letter and resume gave no indication that Jones had any local ties or knowledge of the Columbus, Georgia community which is considered to be important in hiring territory sales representatives. (Morgan Aff., ¶ 7).

Morgan did not know Linda Jones. He was unaware that Jones had given a deposition in the *Ridgeway* case or of the substance of her testimony in that deposition. He was also unaware of any charge, grievance or complaint

lodged by Jones with the Bayer Human Resources Department, the EEOC, or any other entity. It was only in the course of this litigation that he learned that Jones had filed an EEOC claim in Mississippi concerning her former employment with Bayer. (Morgan Aff., ¶ 8).

At the time Morgan ran the advertisement, received resumes in response, and filled the position he had no discussions concerning Jones with Laura Collins or any Bayer employee. (Morgan Aff. ¶ 9; Collins Aff., ¶¶ 34-36).

On February 2, 1997, Bayer ran an advertisement for PSR positions in the Atlanta Journal Constitution for the Atlanta metropolitan area territory. There were four Atlanta territory sales representative positions open. (Green Aff., ¶ 4). Cynthia Green received in excess of three hundred (300) resumes in response to the advertisement. (Green Aff., ¶ 5). These four positions were filled as follows: Susan Gold was hired on March 4, 1997; Linda Hubly was hired March 5, 1997; Virginia Mitchell was first interviewed on March 3, 1997, and hired on April 18, 1997; and Jeff Wilson was first interviewed on March 25, 1997, and hired on April 8, 1997. (Green Aff., ¶ 6).

Green did not consider any resumes received after March 1, 1997. (Green Aff., ¶ 7). Jones' resume was received by Green at some point after interviewing Jeff Wilson on March 25, 1997. This was 51 days after the advertisement ran and after the interview process was almost complete. (Jones Dep., pp.

137-139; Green Aff., ¶ 8).

Jones never applied for any Georgia position other than the Columbus position available n August, 1996 and the Atlanta positions available in February, 1997. (Jones Dep., pp. 138-139). At the time of the Atlanta advertisement and Green's consideration of responses thereto, Green was not aware of any complaint, grievance, or charge alleging discrimination, harassment or retaliation made by Jones to the EEOC, Bayer or anyone else. (Green Aff., ¶ 11). Laura Collins did not participate in any way in Green's review of resumes and consideration of candidates. (Collins Aff., ¶¶ 35-37). Laura Collins did not have any conversations with either Harold Morgan or Cynthia Green concerning Linda Jones as a candidate for field sales representative positions in Georgia in August-September 1996 or February-March 1997 (Collins Aff., ¶ 37).

On June 9, 1997, Jones filed a charge of discrimination with the Georgia EEOC. Bayer answered on August 6, 1997. The Georgia EEOC issued a notice of right to sue letter on July 31, 1997, prior to the expiration of 180 days from filing of the charge but without making any finding with regard to Jones' charges.

Jones filed the instant lawsuit on September 4, 1997, in the United States District Court for the Northern District of Georgia, Atlanta Division.

General

All Bayer employees receive an Employee Handbook which sets forth information concerning Bayer, work place diversity, equal access and opportunity, vacations and holidays, absences and leaves of absence, compensation, career development, work and family, standards of conduct and conflicts of interest, etc. Bayer's Employee Handbook contains specific provisions setting forth Bayer's policy that harassment and/or discrimination on the basis of sex is prohibited. Both Corley and Stamboulieh received Bayer handbooks setting forth Bayer prohibitions concerning sexual harassment, sexual discrimination and other inappropriate workplace behavior.

The employee complaint procedure sets forth a four-step process. Step one directs the employee to discuss the complaint with his or her immediate supervisor. Step two directs the employee to discuss the complaint with the next higher level line manager or Human Resources Department. Step three directs the employee to make a written complaint to the local Human Resources Department. Step four requires the employee to make a complaint to the corporate Human Resources Department.

Jones was aware that Bayer had a policy prohibiting sexual harassment and discrimination. Jones understood that Bayer's policy was that all employees be treated the same regardless of gender.

CONTENTIONS

Jones claims she was discriminated against by Bayer on account of her sex in that she was denied promotions and was not rehired due to her sex, that she was subjected to sexual harassment, and that she was denied a promotion and was not rehired in retaliation for testifying in a co-worker's Title VII case.

TIMELINESS OF COMPLAINT

Bayer argues that Jones' claims of sexual harassment, the denial of certain promotions, and other acts of alleged discrimination are time barred. Jones' Complaint alleges that Bayer is liable to her under Title VII for "sexual harassment and/or sexual discrimination" and for "harassment and discrimination . . . directed toward the plaintiff because of her gender." She asserts that she was sexually harassed by Corley and Stamboulieh. She also asserts that she was denied promotions in 1991 and 1995 and that she was given an unfair Interim evaluation in 1994. The plaintiff maintains that these acts were part of a continuing violation.

To support a claim under Title VII, a plaintiff must show that liability is based on conduct occurring within 180 days of the date she filed a charge of discrimination with the EEOC. *See* 42 U.S.C. § 2000e-5(e); *United Air Lines, Inc. v. Evans* 431 U.S. 553, 558-60 (1977); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448 (11th Cir. 1993). Conduct occurring more than 180 days before a charge is filed may support a claim only if the plaintiff

proves actionable discrimination within the 180-day period *and* proves that the earlier conduct is part of an interrelated pattern of harassment that did not become actionable as a course of conduct until some point within the 180-day period. *Calloway*, 986 F.2d at 448.

Plaintiff filed her charge of discrimination with the Mississippi EEOC on August 12, 1996. Therefore, plaintiff must establish a specific act of discrimination which occurred between February 12, 1996 and August 12, 1996. During that timer period, plaintiff's manager was Rosato, with whom she had no problems. (Jones Dep., pp. 197-198). In her July 12, 1996, EEOC charge and in her deposition, Jones complains of several events in 1993 and 1994 that she says were harassing because of her sex or discriminatory based on her sex, such as her 1994 evaluation. According to her own testimony, each of these events occurred far more than 180 days before she filed a charge of discrimination with the EEOC.

The alleged discrimination is attributed to Jones' Division Sales Manager, George Stamboulieh, and the Regional Sales Manager, Bill Corley. Stamboulieh and Corley each ceased having any connection whatsoever with her as of January-February 1995, a year and a half before her charge. (Stamboulieh Aff. ¶ 12; Corley Aff. ¶ 1). In January 1995, Bayer reorganized its entire sales force, and Jones thereafter worked under Rosato. (Jones Dep. at 63-64). From February 1995 until February 1996, Jones made no complaint whatsoever to

anyone in Bayer's Human Resource Department (Collins Aff. ¶ 28).

Jones felt that Stamboulieh discriminated against her and other women. He had the women sales persons come into town the night before sales meetings and had dinner with him, these were referred to as his "harem." Stamboulieh at first refused to allow her to take her 11-year old daughter to Hawaii as her significant other and he encouraged the women to socialize with the men in the sales force. Yet she filed no charge of discrimination at these times. Plaintiff resigned her employment during a career development meeting on June 28, 1996. Plaintiff contends that two females, Donna Conder-Flanery and Laura Collins, "provoked" her into quitting. Even assuming discriminatory action in the resignation, plaintiff cannot establish a link between her voluntary resignation and the allegedly harassing or discriminatory conduct she now attributes to her former managers, Corley and Stamboulieh, all of which occurred prior to their transfer in early 1995. She also cannot show any interrelation between the denial of the Texas promotion in 1996 to any actions by Stamboulieh or Corley. The decision as to the Texas promotion was made by two individuals with no relationship to Stamboulieh or Corley.

There is no showing of a connection between the events at the time she was supervised by Stamboulieh and Corley and any even within the 180 day time period, long after their supervision ended. Thus, the allegations

of sexual harassment, denial of promotions or unsatisfactory evaluations which occurred outside of the 180 day time period are time-barred. *Webb v. Cardiothoracic Surgery Associates*, 139 F.3d 532 (5th Cir. 1998) (Plaintiff cannot rely on equitable exception of a continuing violation where she was well aware of the facts supportive of an unlawful employment practice years before she filed suit).

Jones also complains that she was not promoted during the 180 days before her August 12, 1996, charge of discrimination, while certain males were, and that these promotion decisions were made because of her sex. (Jones Dep., pp. 94-98). Jones has no direct evidence of discrimination and must rely on the indirect proof scheme established for cases based only on circumstantial evidence. To satisfy a prima facie case of discrimination in a failure to promote case, a plaintiff must prove (1) that she is a member of a protected class (2) that she "sought and [was] qualified for positions that [the employer] was attempting to fill," (3) that she was rejected despite her qualifications, and (4) that the employer either continued to attempt to fill the position or filled it with someone outside the plaintiff's protected class. *Walker v. Mortham*, 158 F.3d 1177, 1186 (11th Cir. 1998).

Bayer's burden in response is simply to articulate some "legitimate, non-discriminatory reason" for its action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Bayer is not required to "persuade

the court that it was actually motivated by the proffered reasons." It must only "produce admissible evidence which would allow the trier of fact to conclude that the employment decision had not been motivated by a discriminatory animus." *Id.* at 256; *accord Morgan v. City of Jasper*, 959 F.2d 1542, 1548 (11th Cir. 1992). Throughout the inquiry, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 550 U.S. at 256. In response, Jones must show by a preponderance of the evidence that Bayer was not actually motivated by the proffered reasons but that those reasons are instead a pretext for gender discrimination. *See, St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). *Archambault v. United Computing Sys.*, 786 F.2d 1507, 1512 (11th Cir. 1986). This she has failed to do.

On her claims of failure to promote, one element of Jones' prima facie case is to prove that she "sought and [was] qualified for positions that [Bayer] was attempting to fill." (emphasis added) *Walker*, 158 F.3d at 1186. Construing her testimony liberally, Jones has testified the following male sales representatives as having received promotions to which she was entitled: Jim Sadler, Phil Smith, Tony Chandler, Marv Kelly, Mark Ramby, John Barber and Stephen Duffy. (*Jones Dep.*, pp 96-98, 114-115, 132). Jim Sadler was promoted to HSS on February 3, 1992; Phil Smith was promoted to Division Sales Manager on February

17, 1997; Tony Chandler was promoted to PSR II on July 7, 1997; Marv Kelly was promoted to BAE on July 1, 1995; Mark Ramby was promoted to BAE on May 20, 1996; John Barker was promoted to HAS on August 1, 1995; and Stephen Duffy was promoted to BAE and then to HSS in July-August of 1995. (Collins Aff. ¶¶ 14-20). As noted, any acts prior to February, 1996, are time barred. Thus, the Sadler, Kelley, Barker and Duffy promotions are barred from review. Additionally, Jones' own testimony is that from 1991 until February, 1996 she never spoke to any supervisor about a promotion and never expressed to any supervisor any interest in a promotion. (Jones Dep., pp. 89-90). At a meeting in November, 1994 with Stamboulieh, Corley, and Laura Collins to discuss what she felt was unfair treatment, she mentioned nothing about a failure to be promoted. (Collins Aff. ¶¶ 23-25 and Exhibit C). Jones, in fact, told Stamboulieh that she was not interested in a promotion into management. (Stamboulieh Dep., p. 152). It was not until January, 1996 that she expressed to her supervisor, Rosato, an interest in receiving a promotion. (Jones Dep., pp. 89-90, 96). At the same time, however, in early February 1996, Jones stated that she did not then want to be promoted because of concerns over additional travel, but that she would be interested in a promotion in the future. (Jones *Ridgeway* Dep. at 29-32).

Jones cannot claim that she was discriminated against based on her gender in promotions for which she had not applied. With

the exception of Mark Ramby, all of the male sales representatives identified by Jones were promoted before August of 1995 or after Jones voluntarily resigned. (Collins Aff., ¶¶ 14-20 and 23). Bayer did not have reason to believe that Jones was interested in a promotion until early 1996. Jones had not "sought" promotional opportunities until that time and may not raise previous promotions of males in support of her claim.

When Jones did express to Rosato in January, 1996 that she had an interest in promotion, Bayer acted immediately. Rosato offered her the opportunity to interview for a position as a biological sales representative, (Jones Dep., pp. 90-91). She declined the opportunity because the job was based in New Orleans and would have required overnight travel to Shreveport, Louisiana. (*Id.*) The position was ultimately filled by a woman, Pam Campbell. (*Id.*) Only weeks later, in early April, 1996, Rosato informed Jones of two other biological sales representative positions open in Texas, one in Dallas and one in Houston, and he invited her to apply. (Jones Dep., pp. 91-92). She at first told him that she was not interested in either opening. She then changed her mind and informed Rosato, "after thinking living in Houston would not be a bad thing, and being afraid there may not be any other promotion opportunity later on, that I would go ahead and interview for only the Houston biological position." (*Id.*) She then interviewed for the Houston position in early May, 1996 but was not

selected. Jones quit her job on June 28, 1996. (*Id.*, pp. 108-9, 111-12).

Thus, of the positions that Jones contends she was denied, the only promotion that she "sought" was the biological sales representative position in Houston, and it, therefore, is the only one which can satisfy her prima facie case of discrimination under *Walker*, 158 F.3d at 1186. All of the others were filed before she ever expressed an interest in promotion or after she quit her job.

Jones' claim that Bayer discriminatorily denied her a promotion to a biological sales representative position in Houston in May, 1996 fails because she cannot prove pretext. Bayer has satisfied its burden of articulating a legitimate business reason for the decision: the person selected, Mark Ramby, was rated as the better candidate by the two decision-makers, Craig Turner and Carole Guthrie. (Turner Aff. ¶¶ 11-13 and Ex. A; Guthrie Aff. ¶¶ 5-14, 17 and Exs. A and B). "If the employer selects the person the employer feels is best qualified, assertions of pretext will ordinarily fail. *Smith v. Horner*, 839 F.2d 1530. 1538 (11th Cir. 1988). Title VII does not require that the employer promote the most qualified person, only that sex not enter the equation. *Id.; see also, Burdine*, 450 U.S. at 259. 101 S.Ct. at 1096." *Stone v. Galaxy Carpet Mills, Inc.*, 841 F. Supp. 1101, 1186 (N.D. Ga., 1993). Here, Bayer's evidence is that Ramby was the more qualified candidate, as fully explained by Turner and Guthrie in their Affidavits.

In the face of this evidence, Jones must produce facts to show that Bayer's reasons are a pretext for sex discrimination. Again, Jones retains at all stages the burden of proving that sex was a motivating factor in the decision-making process. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). Her only "evidence" to prove pretext is her own subjective and unsupported opinion that Ramby was not as qualified as she was. (Jones Dep. pp. 95-96). Her opinion provides no basis to establish pretext.

While it is Jones' burden to prove pretext by showing she should have been selected, and while Bayer could prevail simply based on her lack of such evidence, Bayer has in fact gone beyond its evidentiary burden and submitted uncontradicted testimony of the decision-maker's hiring criteria; adaptive thinking, versatility, self confidence, resourcefulness, action and results orientation, organizational awareness, concern for impact, interpersonal awareness, relationship building, and teamwork. (Guthrie Aff. ¶ 10; Turner Aff. ¶ 9). In the face of these uncontradicted facts as to the decision-makers' hiring criteria and as to their evaluation of Jones' abilities, Jones' mere speculation as to the credentials of the other candidates wholly fails to establish pretext. *See, e.g., Hill v. Seaboard Coast Line R.R.*, 885 F.2d 804,. 809-10 (11th Cir. 1989) (subjective evaluation of applicant's skills was a valid basis for promotion decision.); *McCarthney v. Griffin-Spalding Bd. of Educ.*, 791 F.2d 1549, 1550-51 (11th Cir.

1986) (n discrimination in failure to promote teacher based in part on evaluation of her ability to get along well with others); *Baldwin v. Bellsouth*, 677 F.Supp. 1573, 1575 (M.D. Ga. 1988).

Jones' second material allegation of adverse treatment within the 180 day period of her first EEOC charge is her claim that she was constructively discharged on June 28, 1996. According to the Court of Appeals for the Eleventh Circuit a constructive discharge claim requires a plaintiff to show that her "working conditions were so difficult or unpleasant that a reasonable person in [her] position would have felt compelled to resign." *Kilgore v. Thompson & Broch Management, Inc.*, 93 F.3d 752, 754 (11th Cir. 1996). A plaintiff must show "a high degree of deterioration in working conditions, approaching the level of intolerable." *Hill v. Winn-Dixie*, 934 F.2d 1518, 1527 (11th Cir. 1991). Further, constructive discharge will not be found if the employer is not given sufficient time to remedy the situation. *Kilgore*, 93 F.3d at 754.

Here, Jones simply does not have evidence of working conditions "so difficult or unpleasant" as to force her resignation. She quit during a meeting with Laura Collins and Donna Conder-Flanery because, accepting her own testimony as true, Conder-Flanery became angry, raised her voice, and spoke in a heated and confrontational manner. (Jones Dep., pp. 99-109). Jones believed that Bayer was retaliating against her for testimony in the

Ridgeway case. (*Id.*, p. 99), and she believed that the Company generally refused to promote her. She had been offended before when Conder-Flanery had told a group of females at a sales meeting that she would take them shopping so that they could "bond" while the men played golf. (*Id.*, pp. 63-64, 116-17). Jones had also been offended at what she believed was Conder-Flanery's "[making] a big issue in front of everybody" at a sales meeting about Jones not understanding a product. (Id., pp. 113-14) According to her own version of the evidence, these were the offensive acts of the person responsible for compelling her to resign. This is simply not the hostile environment anticipated by the constructive discharge cases.

Jones admits that she quit during the June 28th meeting after lying about having other job offers because she thought that information would make Bayer "say we need to promote her, we need to keep her." (Jones Dep., pp. 109). In fact, within hours, she was asking for her job back. (Id., pp. 109-12) Thus, her own evidence hardly proves that she felt compelled to resign, much less than any reasonable person would have. Rather, her own testimony shows that she became angry and walked out of a counseling meeting with her superior, and then wanted her job back as soon as she calmed down. Those facts cannot prove constructive discharge. *See Kilgore, supra; Hill, supra.*

Further, Jones has no evidence that any conduct in the June 28, 1996, meeting was aimed at her because of her gender. Thus, even

if she can prove that her voluntary resignation was an adverse action taken against her by Bayer, she still cannot maintain a Title VII claim because nothing about the meeting related to her sex or occurred because of her sex. She certainly has no evidence, direct or otherwise of sexual harassment or bias on the part of the two other females at the meeting, Collins or Conder-Flanery. *Llampallas v. Mini-Circuits Lab., Inc.*, 163 F.3d 1236 (11th Cir. 1998).

Finally, she quit during the allegedly hostile meeting itself, without giving Bayer any opportunity to address the allegedly offending conduct. Her failure to allow Bayer to respond to whatever concerns she had about her treatment at the meeting is fatal to her constructive discharge claim. *Kilgore*, 93 F.3d at 754; *see also, Jones v. USA Petroleum Corp.*, 20 F.Supp. 2d 1379 (S.D. Ga. 1998).

RETALIATION

Jones' retaliation claim is two-fold. First, she alleges that Bayer did not promote her because of her deposition testimony in the *Ridgeway* case. Second, she alleges that Bayer refused to rehire her for job openings in Georgia, after her June 1996 resignation, because she had filed an August 12, 1996, EEOC charge. For the reasons given below, the plaintiff has not stated a prima facie case of retaliation.

To establish a prima facie case of retaliation under Title VII a plaintiff must show that: (1) she filed a Title VII claim or participated in one; (2) she was subjected to an

adverse employment action; and (3) a causal connection existed between the filing of a charge and the adverse employment decision. *See, e.g., Morgan v. City of Jasper*, 959 F.2d 1542, 1547 (11th Cir. 1992). Thus, the plaintiff must do more than show that the protected activity was followed by an adverse employment action – she must show a causal connection between the two. *See, e.g., Thurman v. Robertshaw Control Co.*, 869 F. Supp. 934, 942 (N.D. Ga. 1994) ("The mere presence of a temporal sequence which shows the discharge following the filing of the discrimination claim is, in and of itself, not sufficient to substantiate the requisite causal connection.").

Plaintiff alleges the adverse employment actions were the failure to promote and/or re-hire. Plaintiff attempts to meet the third prong by alleging that Laura Collins, George Stamboulieh, Bill Corley and in-house counsel "knew" of the deposition she gave in *Ridgeway*, and therefore, the alleged failure to promote for the Houston job and failure to re-hire in Georgia were retaliatory.

Jones maintains that following her February 22, 1996, deposition in the *Ridgeway* case, she was retaliated against when she was denied the promotion for which she interviewed in Houston in May, 1996, with Carole Guthrie and Craig Turner. Deposition testimony is a protected activity under Title VII. *See, Merritt v. Dillard Paper Co.*, 120 F.3d 1181 (11th Cir. 1997). However, the uncontradicted evidence is that Guthrie and Turner, the sole decision-

makers, were unaware that Jones had even given a deposition. (Guthrie Aff. ¶ 16; Turner Aff. ¶ 15). No retaliatory motive can exist when the decision-maker had no knowledge of the protected activity. Guthrie and Turner's lack of knowledge of Jones' deposition testimony precludes any causal connection between the testimony and the denial of the promotion. *See Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1997 (11th Cir. 1997) (plaintiff failed to establish requisite causal link between protected expression and adverse action when she failed to show that the vice-president knew of her protected activity.

Following her resignation from Bayer on June 28, 1996, Jones applied for pharmaceutical sales representative positions that were advertised by Bayer for the Atlanta area and the Columbus area. She was not selected for either position and now argues that Bayer's failure to rehire her constituted retaliation for her July 12, 1996 EEOC charge. However, the persons who made the hiring decisions, Cynthia Green and Harold Morgan, had no knowledge that Jones had filed an EEOC charge against Bayer. (Green Aff. ¶ 11; Morgan Aff. ¶ 8). Similarly, Jones has produced no evidence that either of them knew of her earlier deposition testimony in the *Ridgeway* case. As stated above, Jones cannot prove that Green and Morgan had a retaliatory motive in failing to hire her, without first proving that they had knowledge of her protected activity, which she has failed to do.

Further, mere knowledge that an employee has participated in a protected activity is insufficient. The decision makers have proffered legitimate reasons for taking the employment actions at issue, and therefore, plaintiff must show that the actions were a pretext for the allegedly retaliatory conduct. *See Olmsted Taco Bell Corporation*, 141 F.3d 1457 (11th Cir. 1998). This plaintiff has failed to do.

Assuming Jones could establish a prima facie case of discrimination, she still is unable to survive summary judgment because Bayer had legitimate non-discriminatory reasons for its hiring decisions. (*See* Morgan Aff.; Green Aff.) Jones responded to the advertisement for the Atlanta position 51 days after it ran and three weeks after Green had completed her review of responses to the ad. (Green Aff. ¶¶ 86-87) The reasons explained by these decision-makers have absolutely no relation to *Ridgeway*, and Jones has offered no evidence that the reasons are a pretext for retaliation or discrimination.

CONCLUSION

All of plaintiff's sexual harassment claims involve the time in which the plaintiff was reporting to Corley and Stamboulieh. Corley and Stamboulieh were transferred as a part of a Bayer reorganization in January of 1995 and had no further interaction with plaintiff. Therefore, as plaintiff did not file a Charge of Discrimination until August 12, 1996, any and

all claims concerning Corley and Stamboulieh are time barred. This includes all claims involving promotions or performance evaluations brought by the plaintiff during the time period she was supervised by them.

As to the failure to promote to the Houston position, there were legitimate reasons to hire Ramby. There is no evidence that the decision makers knew of plaintiff's deposition testimony in the *Ridgeway* case or of her complaints of discrimination.

As to the failure to rehire the plaintiff for a Georgia position, it appears that the plaintiff's applications were late and thus never considered. Additionally, the undisputed evidence is that the decision makers for these positions were unaware of any testimony by the plaintiff or any protected findings of discrimination complaints.

Based on the discussion above, the undersigned RECOMMENDS THAT Bayer's Motion for Summary Judgment be GRANTED.

SUMMARY

IT IS RECOMMENDED THAT the defendant's Motion for Summary Judgment be GRANTED. (23)

IT IS ORDERED THAT the defendant's Motion to Strike be DENIED. (44).

IT IS SO ORDERED AND RECOMMENDED this 30 OF July, 1999.

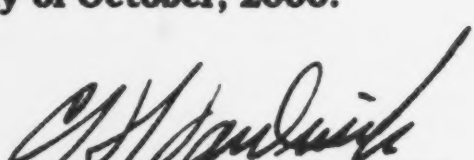
s/John R. Strother, Jr.
JOHN R. STROTHER, JR.
UNITED STATES
MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Respondent with three true copies of the foregoing Appendix To Petition For Writ Of Certiorari by depositing same in the U.S. Mail, with proper postage affixed thereto, and addressed as follows:

Mr. Stephen M. Brooks
Mr. Stephen M. Lore
Smith, Helms, Mulliss & Moore, LLP
1355 Peachtree Street, N.E.
Suite 750
Atlanta, Georgia 30309

This the 24th day of October, 2000.



Clifford H. Hardwick
Attorney for Petitioner
Georgia Bar No. 325675

Roswell Professional Park
Suite E-1
11205 Alpharetta Highway
Roswell, Georgia 30076-1442

(770) 772-4700